

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

UNITED STATES OF AMERICA,

And,

THE STATE OF LOUISIANA

Plaintiffs,

Civil Action No. 17-CV-1660

V.

ORION ENGINEERED CARBONS, LLC,

Defendant.

**MEMORANDUM IN SUPPORT OF UNOPPOSED JOINT MOTION TO
ENTER FIRST AMENDMENT TO CONSENT DECREE**

Plaintiffs, the United States of America (“United States”), on behalf of the U.S. Environmental Protection Agency (“EPA”), and the Louisiana Department of Environmental Quality (“LDEQ”), submit this Memorandum in Support of their Unopposed Joint Motion to Enter First Amendment to Consent Decree.

I. PRELIMINARY SUMMARY AND STATEMENT

The consent decree in the above-captioned matter, entered by this Court on June 7, 2018 (Rec. Doc. 10, herein after “Consent Decree”), resolved claims by the United States and the State of Louisiana alleging violations of certain Clean Air Act (“CAA”) provisions at Orion Engineered Carbons, LLC’s (“Defendant’s” or “Orion’s”) four carbon black manufacturing facilities in Franklin, Louisiana (“Ivanhoe”), Borger, Texas (“Borger”), Orange, Texas (“Orange”), and Belpre, Ohio (“Belpre”). The proposed First Amendment to Consent Decree (“CD Amendment”) would, if entered by the Court, make modifications to the Consent Decree to

address claims by Defendant that the COVID-19 crisis and Hurricane Ida are Force Majeure events that caused delays in meeting certain compliance deadlines at Ivanhoe. On November 19, 2021, the proposed CD Amendment was lodged with this Court (Rec. Doc. 11). On December 10, 2021, notice of the lodging was published in the Federal Register to allow for public comment. 86 Fed. Reg. 70533 (Dec. 10, 2021). The 30-day comment period has expired and no comments were received.

As set forth below, the proposed CD Amendment is fair, reasonable, and consistent with the goals of the Clean Air Act. The United States, LDEQ, and Orion have all signed the CD Amendment. In addition, Orion has agreed not to oppose entry of the CD Amendment, and only the United States had conditioned final approval of the CD Amendment on the public comment procedures of 28 C.F.R. § 50.7. *See* CD Amendment ¶ 17.

For these reasons, and as set forth below, Plaintiffs respectfully request that the Court sign and enter the proposed CD Amendment that was included as Exhibit 1 to the Notice of Lodging (Rec. Doc. 11-1).

II. THE PROPOSED CD AMENDMENT

A. Consent Decree Requirements

The Consent Decree entered by this Court on June 7, 2018 requires Orion to install and operate pollution controls on all four of its facilities in order to secure substantial reductions in sulfur dioxide (“SO₂”), nitrogen oxides (“NO_x”), and particulate matter (“PM”). Under the Consent Decree, Orion must install new SO₂ scrubbers and meet stringent SO₂ emission limits at Ivanhoe and at either Belpre or Borger; meet enforceable SO₂ tonnage caps at Belpre, Borger, and Ivanhoe; and meet enforceable limits on the sulfur content of feedstock at Orange. *See* Consent Decree ¶¶ 16-22. In addition, Orion must install new selective catalytic reduction

controls and meet stringent NO_x emission limits at all four facilities. *See* Consent Decree ¶¶ 26-32. Orion also must optimize its existing PM controls at all four facilities, and meet stringent PM emission limits at the facilities that receive SO₂ scrubbers. *See* Consent Decree ¶¶ 33-37. Finally, the Consent Decree imposes restrictions on using flares to control tail gas emissions at all four facilities.

B. Orion's Force Majeure Claims

On March 23, 2020, pursuant to Paragraph 105 of the Consent Decree, Orion transmitted to Plaintiffs a Notice of Intent to Assert Claim of Force Majeure as a result of the COVID-19 pandemic, and since then has provided periodic updates to Plaintiffs. On September 27, 2021, Orion transmitted to Plaintiffs a Second Notice of Intent to Assert Claim of Force Majeure as a result of staffing issues related to the Delta variant's intensification of the COVID-19 crisis, and as a result of actions that Orion had to take in response to Hurricane Ida. Orion has informed Plaintiffs that transport delays caused by the COVID-19 pandemic, combined with the need to comply with applicable COVID-19 restrictions, including social distancing restrictions as well as related rules and recommendations, caused delays in complying with certain Consent Decree obligations relating to Ivanhoe. Orion represents that it has exercised best efforts to prevent or minimize any resulting delay and/or violation and/or emissions during the aforementioned events to the greatest extent possible, in accordance with its obligations under the Force Majeure provisions of the Consent Decree.

C. Proposed CD Amendment

The proposed CD Amendment makes modifications to the Consent Decree to address and resolve Orion's claims that Force Majeure events caused delays in meeting certain compliance deadlines at Ivanhoe. The modifications are based on lengthy negotiations aimed at proactively

minimizing the length and impact of those delays while they were occurring and as the COVID-19 crisis evolved. Specifically, the modifications extend certain deadlines for continuous operation of controls at Ivanhoe by approximately 6.5 months. *See* CD Amendment ¶¶ 2, 6, 7, 8, 12, 13, 14, and 15. In order to limit the impact of those delays, the CD Amendment also establishes interim deadlines for initial operation of those controls, which Orion committed to meet even before finalization of this modification. *See* CD Amendment ¶¶ 1, 2, 3, 8, 9, and 13. The modifications also accelerate by two weeks certain other compliance deadlines at Belpre, securing slightly sooner compliance for requirements that were not impacted by Orion’s Force Majeure claims. *See* CD Amendment ¶¶ 2, 4, 5, 7, 8, 9, 10, 11, and 15. In short, the proposed CD Amendment maintains Defendant’s ultimate obligation to install and operate pollution controls at all four facilities, while recognizing the need for certain additional compliance time in light of the unprecedented challenges posed by the COVID-19 pandemic. Because these extensions result in a material change of the terms of the settlement, they require Court approval pursuant to Paragraph 111 of the Consent Decree.

IV. STANDARD FOR ENTRY

The applicable standard for reviewing an unopposed amendment to a consent decree is the same as the standard for reviewing the original consent decree, except that the Court can limit its scrutiny to the proposed modification since, by entering the original Consent Decree, the Court has already reviewed and approved the other provisions. *Ruiz v. McKaskle*, 724 F.2d 1149, 1152-53 (5th Cir. 1984) (describing factors established by the Fifth Circuit for evaluation of proposed compromise or settlement when reviewing a District Court decision approving a “Stipulated Modification” of a remedial consent decree issued by the District Court in a civil rights class action); *Bathelemy v. Louisiana Dept. of Health and Hospitals*, No. Civ.A. 00-1083,

2003 WL 1733534, at *1 (E.D. La. Mar. 31, 2003) (applying factors established by the Fifth Circuit for evaluation of settlement proposals in decision granting a Joint Motion to Modify Settlement Agreement).

The reviewing court's role is to ascertain whether the decree is fair, adequate, and reasonable, *see Cotton v. Hinton*, 559 F.2d 1327, 1330 (5th Cir. 1977), and consistent with the objectives of the statute under which the action was brought, *see United States v. City of Miami*, 64 F.2d, 435, 441 (5th Cir. 1981) (Rubin, concurring). The decree must not be the product of collusion, *see Cotton*, 559 F.2d at 1330, or be unlawful, *see United States v. Oregon*, 913 F.2d 576, 580-81 (9th Cir. 1990) (citing *City of Miami*, 664 F.2d at 441). "The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy." *City of Miami*, 664 F.2d at 441 n.13 (Rubin concurring). The court should not "substitute its judgment for that of the parties to the decree." *United States v. Wallace*, 893 F. Supp. 627, 631 (N.D. Tex. 1995); *see also Ruiz*, 724 F.2d at 1152. "Public policy strongly encourages the settlement of cases." *Ho v. Martin Marietta Corp.*, 845 F.2d 545, 547 n.2 (5th Cir. 1988). The presumption in favor of settlement "is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field." *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991) (citing *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir.1990)); *accord United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980) ("consent decree proposed by a private defendant and government agency in an employment discrimination case carries with it a presumption of validity").

V. DISCUSSION

The CD Amendment is fair, reasonable, and adequate, and it is consistent with the purposes of the CAA.

A. The CD Amendment is Fair

“Fairness incorporates both procedural and substantive components.” *United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994). Procedural fairness addresses the fairness of the negotiation process. *Id.* (citing *Cannons*, 899 F.2d at 86). “Procedural fairness requires that the parties to the decree conduct their negotiations forthrightly to achieve a bargained-for resolution to the suit.” *United States v. Atlas Minerals & Chemicals, Inc.*, 851 F. Supp. 639, 653 (E.D. Pa. 1994); *see also Cannons*, 899 F.2d at 87 (procedural fairness requires that the parties to a Consent Decree must have “negotiated at arm’s length.”); *U.S. v. Kramer*, 19 F. Supp. 2d 273, 283-84 (D.N.J. 1998) (same). Substantive fairness addresses matters of corrective justice and accountability. *Cannons*, 899 F.2d at 87. “Substantive fairness flows from procedural fairness” and “mirrors the requirement that the decree be equitable.” *Telluride*, 849 F. Supp. at 1402.

Based on these considerations, the proposed CD Amendment is both procedurally and substantively fair. With regard to procedural fairness, the Plaintiffs and Orion engaged in lengthy and detailed discussions about Orion’s Force Majeure claims. As in *Cannons*, the CD Amendment resulted from adversarial, arm’s-length negotiations. *See* 899 F.2d at 87 (“Given that the decrees were negotiated at arm’s length among experienced counsel . . . and that the agency operated in good faith, the finding of procedural fairness is eminently supportable.”). All parties were represented by experienced environmental attorneys and knowledgeable technical personnel. With regard to substantive fairness, as discussed above, the CD Amendment

ultimately maintains the Consent Decree requirement that Orion install and operate pollution controls that will secure reductions in SO₂, NO_x, and PM emissions, while also recognizing that certain deadline extensions are appropriate in light of Orion's Force Majeure claims and the unprecedented nature of the COVID-19 pandemic. The CD Amendment is based upon the Plaintiffs' careful and informed assessment of Orion's Force Majeure claims. Based on the above procedural and substantive considerations, the negotiations were fair, as is the resulting CD Amendment.

B. The CD Amendment is Reasonable

Assessing the "reasonableness" of a consent decree is "a multifaceted exercise." *Cannons*, 899 F.2d at 89. Reasonableness may be determined by considering "the nature/extent of hazards; the degree to which the remedy will adequately address the hazards; possible alternatives for remedying hazards; and the extent to which the decree furthers the goals of the statute." *Akzo Coatings*, 949 F.2d at 1436 (citing *United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027, 1038) (D. Mass. 1989). "One of the most important considerations when evaluating whether a proposed consent decree is reasonable is 'the decree's likely effectiveness as a vehicle for cleansing' the environment." *United States v. Lexington-Fayette Urban County Gov't*, 591 F.3d 484, 489 (6th Cir. 2010) (quoting *Akzo Coatings*, 949 F.2d at 1437).

The CD Amendment is reasonable because, consistent with the goals of the CAA and the existing Consent Decree, it ultimately ensures the control of air emissions from Orion's carbon black manufacturing facilities and protects the public interest. The CD Amendment maintains the Consent Decree's extensive and comprehensive program of injunctive relief included in the existing Consent Decree, with modest adjustments to the Ivanhoe pollution control deadlines to account for delays caused by COVID-19 and Hurricane Ida. The proposed CD Amendment is

the result of extensive negotiations aimed at minimizing the impact of delays in implementing controls at Ivanhoe. While the CD Amendment delays the date for continuous operation of certain controls at Ivanhoe, it also establishes a date for initial operation of those controls to minimize the impact of the delay. In addition, Plaintiffs successfully negotiated to accelerate the deadline for certain Belpre controls. The injunctive relief measures will still address the violations alleged in the Complaint and will favorably impact air quality by substantially reducing emissions at Orion's facilities. In short, the CD Amendment is reasonable.

C. The CD Amendment is Consistent with the Purpose of the CAA

As explained above, the purpose of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *see also Arizona Pub. Serv. Co. v. U.S. E.P.A.*, 562 F.3d 1116, 1118 (10th Cir. 2009) ("The purpose of the Clean Air Act is to control and improve the nation's air quality . . ."). As discussed above, under the CD Amendment the settlement will still reduce air emissions by requiring Orion to install and operate pollution controls. This will secure significant public health and environmental benefits as envisioned by the CAA.

VI. CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court sign and enter the CD Amendment (Rec. Doc. 11-1).

Respectfully submitted,

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